

**IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA**

**JOEL J. REED, RHONDA REED, JIM L.
PIGEON, MICHELLE R. PIGEON,
KENNETH GLENN, FRANKLIN GLENN,
JULIE ANDERSON CHANCELLOR, and
BILL ANDERSON**

Plaintiffs,

v.

**STATE OF OKLAHOMA, Ex Rel THE
DEPARTMENT OF AGRICULTURE,
FOOD AND FORESTRY,**

Defendant.

Case No.

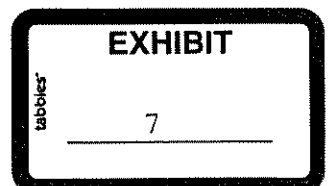
**PLAINTIFFS' APPLICATION FOR
TEMPORARY RESTRAINING ORDER AND BRIEF IN SUPPORT**

Plaintiffs Joel J. Reed, Rhonda Reed, Jim L. Pigeon, Michelle R. Pigeon, Kenneth Glenn, Franklin Glenn, Julie Anderson Chancellor, and Bill Anderson (collectively, "Plaintiffs"), for their Application for Temporary Restraining Order respectfully state as follows:

FACTS

1. Plaintiffs own and operate farms located in Delaware County, Oklahoma. As part of their farming operations, chickens are raised on Plaintiffs' farms. Plaintiffs use some of the resulting chicken litter as fertilizer on their farms.

2. Plaintiffs' farms are registered under the Oklahoma Registered Poultry Feeding Operations Act ("ORPFOA"). Plaintiffs' farms are in compliance with their Nutrient Management Plan required by the ORPFOA.



3. On May 3, 2005, Plaintiffs and/or their representatives, along with other poultry growers, met with Dan Parrish, Director of the Agricultural Environmental Management Services (Mr. Parrish") and Terry L. Peach, Commissioner of Agriculture ("Commissioner Peach") to discuss soil and litter sampling requests that had been made by the ODAFF. See Affidavits of Julie Anderson Chancellor, Joe Reed, Jim L. Pigeon and Kenneth Glenn, attached hereto and incorporated herein by reference.

4. Following this meeting, on May 18, 2005, Mr. Parrish sent a Memorandum, along with a two page "Considerations Requested by Poultry Operations at the May 3, 2005 meeting at Kansas, Oklahoma." Mr. Parrish therein requested that Plaintiffs volunteer to have their properties tested for numerous substances.

5. Plaintiffs consider themselves good stewards of their land, and are proud of their reasonable and prudent use of poultry litter to enhance the productivity of their farms. As a result, by letter dated May 23, 2005, Plaintiffs advised that they would be pleased to voluntarily allow the ODAFF to sample their fields to determine the soil concentration of the fertilizer nutrients over which the ODAFF has regulatory authority.

6. The "nutrients" over which the ODAFF has authority are: nitrogen; phosphate; potash; calcium; magnesium; sulfur; boron; chlorine; cobalt; copper; iron; manganese; molybdenum; sodium; and zinc ("Nutrients") See Okla. Stat. tit. 2, § 8-77.11 (2004); Oklahoma Agricultural Code ("OAC"), §§ 35:30-29-22(a) and (b). The ODAFF is not authorized to test for any other substances. See Okla. Stat. tit. 2, §§ 10-9.7(C)(3), (D)(2) and (E)(1)(a) and (b) (2004).

7. The ODAFF requested Plaintiffs to agree to sampling and testing beyond ODAFF's authority. Plaintiffs declined to permit the ODAFF to collect samples and test for any substances for which the ODAFF is not authorized to test.

8. In addition to requesting sampling and testing for substances beyond its authority, the ODAFF proposed to conduct sampling inconsistent with the proper protocol for sampling. The ODAFF proposed that its soil sampling would include a six-inch core taken at each soil sampling location with each of those six-inch cores to be broken into three parts, 0"-2", 2"-4" and 4"-6", and each of those separate segments combined and a composite sample analyzed for each segment.

9. The proper protocol for sampling on Plaintiffs' property requires the taking of multiple six-inch cores, combining them on-site and having that single composite analyzed. See OK NRCS Code 590, at 590-2 (Feb. 2004) and OSU Extension Facts publication F-2207. For this reason, Plaintiffs requested that the ODAFF amend its proposed testing regimen for soils to take full-depth (0"-6") cores, combine the cores on-site, and have that single composite analyzed.

10. Plaintiffs advised the ODAFF that they were willing to voluntarily allow the ODAFF to perform its proposed testing regimen, if it was modified to comply with the proper protocol for sampling, even though the ODAFF has no legal authority to require such testing under the either the Oklahoma Registered Poultry Feeding Operations Act ("ORPFOA") or the Oklahoma Poultry Waste Applicators Certification Act ("OPWACA").¹

11. Pursuant to the ORPFOA, the ODAFF may investigate "complaints as to the operation or to determine whether there are any violations of the [Act]." Okla. Stat. tit. 2, § 10-9.10(A)(1)(a) (2004).² Here, however, the ODAFF has not advised that it has received any "complaint" concerning any of Plaintiffs' operations. Nor has the ODAFF any reason to believe

¹ The OPWACA, at 2 O.S. 2001 § 10-9-20(C), authorizes the ODAFF to "take samples of poultry waste and soil at application sites in order to determine their concentration." However, the OPWACA does itself not set any standards or define any terms. Those are established elsewhere.

² Similarly, 2 O.S. 2001 § 2-14(B) authorizes the ODAFF to conduct investigations to determine compliance with the Oklahoma Agriculture Code. Here, the only pertinent parts of the Agriculture Code are the ORPFOA and the OPWACA.

any of Plaintiffs are violating the ORPFOA. In fact, Plaintiffs believe that they were asked to volunteer precisely because they are each in compliance with the ORPFOA. Indeed at the meeting on May 3, 2005, Commissioner Peach stated specifically that Plaintiffs' farms were selected for sampling because said farms are in compliance with their Nutrient Management Plans.

12. At the May 3, 2005 meeting Commissioner Peach handed out a two-page "Summary of Agency Authority for Sampling." Included in that Summary is the ODAFF's authority to enforce Oklahoma's water quality standards. See Okla. Stat. tit. 27A, § 1-3-101(D)(1)(h) (2005 Supp.). However, there has not been any allegation that Plaintiffs have violated any specific water quality standard applicable to any water body. Accordingly, the ODAFF's authority to enforce water quality standards simply is not applicable. See Okla. Stat. tit. 27A, § 1-3-101(D)(h) (2005 Supp.).³

13. On October 18, 2005, Plaintiffs and/or their properties were each named in Statutory Administrative Warrants Allowing Entry to Perform Sampling issued on October 18, 2005 in Case No. CV-05-563 through 566 (the "Warrants").

14. Based on the ODAFF's previous representations, Plaintiffs believe that the ODAFF plans to take samples from their property (a) for an unauthorized purpose, (b) by using an improper and unreliable sampling protocol, (c) which said samples will be tested for substances other than Nutrients within the ODAFF's authority, and (d) that such actions are in contravention of Plaintiffs' rights.

15. Based on the ODAFF's previous representations, Plaintiffs believe that the ODAFF plans to take up to 320 samples per ten acres of property. Such activities are far more intrusive and onerous than the Legislature contemplated when it authorized the ODAFF to have

³ The ODAFF has not promulgated any rules implementing this authority.

access to farmers' lands to protect health safety of the public. In addition and as discussed hereafter, such activities at this particular time of potential cross-contamination of farms, is simply without justification.

16. Plaintiffs have recently discovered that there is an outbreak of "LT" disease, more specifically "Laryngotracheitis," near Plaintiffs' farms. LT disease is a contagious disease of chickens and related birds that can cause high levels of illness or death in a poultry flock within a short period of time. Although the disease is not harmful to humans, it is easily transported by human activities such as walking or driving vehicles over soil contaminated with the disease. Because of this recent outbreak of "LT" disease, and its serious consequences, it has become necessary for Plaintiffs to institute strict biosecurity in an effort to prevent the spread of "LT" disease. The sampling planned by the ODAFF poses a threat to the necessary biosecurity and may contribute to the spread of "LT" disease to and/or among Plaintiffs' farms, through other parts of Delaware County and elsewhere.

ARGUMENT AND AUTHORITY

The purpose of a temporary injunction is to preserve the status quo at the last peaceful, uncontested status that preceded the controversy. Weis v. Renbarger, 670 P.2d 609 (Okla. Ct. App. 1983). See also Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980) (citing Penn v. San Juan Hosp., Inc., 528 F.2d 1181, 1185 (10th Cir. 1975) ("The function of a preliminary injunction is to preserve the status quo pending a final determination of the rights of the parties.")).⁴ Thus, a plaintiff is entitled to a preliminary injunction where it is shown that: (1) there is a likelihood

⁴ The Oklahoma Rules of Civil Procedure have been modeled after the Federal Rules of Civil Procedure, and are substantially similar thereto. See Comments to Oklahoma Rules of Civil Procedure. Reliance upon the construction given to the federal rules by federal courts is therefore appropriate. See Laubauch v. Morgan, 588 P.2d 1071, 1073 (Okla. 1978); Baker v. Knott, 494 P.2d 302, 304 (Okla. 1972). Further, the Court may use federal interpretation as a guide when state law is based on federal counterpart. Warner v. Hillcrest Medical Center, 914 P.2d 1060, 1064 (Okla. Ct. App. 1995).

that it will prevail on the merits of its claim; (2) there is a substantial threat that it will suffer irreparable injury if the injunction is not granted; (3) the threatened injury to the plaintiff outweighs any threatened harm the injunction may have on other parties; and (4) the public interest not will be harmed by the issuance of an injunction. Merrill Lynch v. Dutton, 844 F.2d 726 (10th Cir. 1988); Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc., 805 F.2d 351 (10th Cir. 1986); Smith v. Soil Conservation Serv., 563 F. Supp. 843 (W.D. Okla. 1982). Oklahoma law clearly permits the Court to enter a temporary injunction when it appears by the pleadings that a party is entitled to the relief demanded, and such relief consists of restraining an act, the continuance of which would produce injury to the plaintiff during the pendency of the litigation. See Okla. Stat. tit. 12, § 1382; Angier, 905 P.2d at 807.

Here, the ODAFF has obtained the Warrants for the purpose of sampling and testing far beyond its authority. Plaintiffs will suffer immediate and irreparable injury unless the Court grants this Application and, thereby maintains the status quo.

“It is not necessary that plaintiffs show positively that they will prevail on the merits before a preliminary injunction may be granted.” Atchison, Topeka & Santa Fe Railway Co. v. Lennen, 640 F.2d 255, 261 (10th Cir. 1981). “It is only necessary that plaintiffs establish a reasonable probability of success, and not an ‘overwhelming’ likelihood of success, in order for a preliminary injunction to issue.” Id. (citing Lundgrin, 619 F.2d at 63).⁵ “Preserving the status quo is quite different from finally determining the cause itself.” Id. (citing Penn, 528 F.2d at 1185). The United States Supreme Court has explained:

⁵ “‘When the other three requirements for a preliminary injunction are satisfied, it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.’” City of Chanute v. Kansas Gas and Electric Co., 754 F.2d 310, 314 (10th Cir. 1985) (citations omitted).

... a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party is thus not required to prove his case in full at a preliminary-injunction hearing

University of Texas v. Camenisch, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981).

The present facts clearly provide a high degree of certainty, and at the very least the requisite “reasonable probability,” that Plaintiffs will prevail on the merits.

The evidence demonstrates that the ODAFF has obtained the Warrants to conduct extensive sampling and testing of materials which will be removed from their property. Despite Plaintiffs’ willingness to agree to sampling and testing within the ODAFF’s authority, the ODAFF insists on conducting sampling inconsistent with the appropriate sampling protocol and to test for substances far beyond any authority granted to it. Unless the ODAFF is enjoined from the foregoing conduct, Plaintiffs will be irreparably harmed by the ODAFF’s violation of Plaintiffs’ constitutional protection from unlawful search and seizure. Here, Commissioner Peach has admitted that Plaintiffs’ farms are in compliance with applicable ODAFF rules and regulations. There is no current basis, i.e. probable cause, for this intrusion upon the Plaintiffs and there is specifically no basis for the ODAFF’s proposed fishing expedition for information about anything other than nutrients.

Alternatively, the ODAFF will not suffer any harm if it is held to activities within the authority granted to it. Additionally, preventing the ODAFF from exceeding its statutory authority will serve and protect the public interest. Moreover, the public interest will be best served by preventing the ODAFF’s planned activity at this time as Plaintiffs have recently discovered that there is an outbreak of “LT” disease near their farms which is understood to be fatal to poultry and highly contagious. Because of this recent outbreak of “LT” disease, and its serious consequences, it has become necessary for Plaintiffs to institute strict biosecurity in an

effort to prevent the spread of “LT” disease. The sampling planned by the ODAFF poses a threat to the necessary biosecurity and may contribute to the spread of “LT” disease to and/or among Plaintiffs’ farms, through other parts of Delaware County and elsewhere. The public interest will be best served by minimizing any threat to the further contamination and spread of this disease. For this reason alone, the public interest would be served by delaying the ODAFF’s proposed activity in the areas surrounding this disease outbreak.

CONCLUSION

Based upon the foregoing, Plaintiffs respectfully request that the Court issue an emergency temporary restraining order and/or preliminary injunction enjoining Defendants from the following activities:

- (A) entering their property to perform any sampling until the LT outbreak is resolved;
- (B) using any sampling protocol other than that authorized by OK NRCS Code 590 or OSU Extension Facts Publication F-2207; and
- (C) testing any samples for substances other than “nutrients” as defined in OAC §§ 35:30-29-22(a) and (b).

and grant Plaintiffs such other relief that the Court deems equitable and just.

Respectfully submitted,

**HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.**

By:

Michael Graves, OBA #3539
D. Kenyon Williams, Jr., OBA #9643
John F. Heil, III, OBA #15904
320 South Boston Avenue, Suite 400
Tulsa, OK 74103-3708
Telephone (918) 594-0400
Facsimile (918) 594-0505
ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on October 19, 2005 a true and correct copy of the above and foregoing *PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER AND BRIEF IN SUPPORT* was sent by hand-delivery, facsimile and certified mail, return receipt requested, to:

Teena G. Gunter,
Deputy General Counsel
David Leavitt, Counsel
Oklahoma Department of Agriculture,
Food, and Forestry
2800 North Lincoln Boulevard,
Oklahoma City, OK 73105-4298

Commissioner Terry L. Peach
Oklahoma Department of
Agriculture, Food, and Forestry
2800 North Lincoln Boulevard,
Oklahoma City, OK 73105-4298

W. A. Drew Edmonson
Attorney General for the State of
Oklahoma
112 State Capitol
2300 N. Lincoln Blvd.
Oklahoma City, OK 73105-4894

D. Kenyon Williams, Jr.

572958.1:712304:00550